No. 77-1766

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES A. LINCOLN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1766

JAMES A. LINCOLN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-24a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1978. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 11, 1978 (a Sunday), and the petition was filed on June 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners had standing to challenge the legality of, or were entitled to examine the logs of, government wiretap interceptions of conversations on third party telephones, where the government certified that no conversations of petitioners had been overheard during the course of the interceptions.

2. Whether the applications for wiretap authorizations in this case sufficiently established that other investigative methods had been found inadequate.

STATEMENT

Following a bench trial in the United States District Court for the District of Columbia, petitioners James and Albert Lincoln were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Sumpter was convicted of operating a lottery and making an unlawful communication, in violation of 22 D.C. Code 1501 and 18 U.S.C. 1084. James and Albert Lincoln were each sentenced to three years' imprisonment and a $5000 fine. Sumpter was sentenced to one to three years' imprisonment, six months of which was to be served and the remainder suspended.

The case was submitted on the basis of stipulated evidence, a large part of which consisted of telephone conversations intercepted pursuant to court order. The sole issue at trial and on appeal was whether the evidence derived from the interceptions should be suppressed.

1. On July 26, 1974, Chief Judge Hart of the United States District Court for the District of Columbia authorized the interception of communications to and from a telephone in a house on Seventh Street, N.W., in the District of Columbia. The government's affidavit in support of the Seventh Street interception detailed evidence from confidential informants, physical surveillance of the premises, and a court-approved pen

register (J.A. 89-93, 106-123).[1] The affidavit described a number of interceptions previously conducted by the FBI and local police and disclaimed that any information derived from those interceptions had been used to support the request for court authorization for the wiretap.

On August 17, 1974, Judge Young of the United States District Court for the District of Maryland authorized the interception of communications to and from two telephones in an apartment in Landover, Maryland. The government's affidavit in support of the Landover order incorporated the Seventh Street affidavit and included information derived from the Seventh Street interception (J.A. 211-235).

2. Petitioners were indicted on the evidence derived from the two wiretaps. Prior to trial, they filed motions to suppress all the evidence obtained by means of electronic surveillance. They alleged, *inter alia*, that the evidence was tainted because the informants whose disclosures had supported the Seventh Street and Landover interceptions had been discovered through exploitation of certain earlier wiretaps that had previously been held unlawful. The basis for this claim was that the earlier wiretaps had involved the investigation of illegal gambling and had occurred during the same general time period in which four of the informants involved in this case had first begun to provide information to the FBI (J.A. 345-367). Petitioners also sought discovery of the tapes and transcripts of the communications intercepted in the course of eight of the previous wiretaps, so that they could determine whether any of their conversations were intercepted at that time. None of the eight previous wiretaps had been on telephones in residences owned or occupied by petitioners.

---

[1] "J.A." refers to the appellants' joint appendix in the court of appeals. "Gov. App." refers to the government's appendix in that court.

At the first of two hearings on petitioners' suppression motion, the FBI agent who assembled the information that went into the government's affidavits testified that none of the informants used in the present investigation were developed as a result of any of the illegal interceptions (J.A. 371-372, 382).

At the second suppression hearing, petitioners requested all the tapes and transcripts of eight of the previous illegal interceptions, asserting that it was possible that their conversations had been intercepted in the course of those wiretaps (Tr. II 5, 8, 21, 34). The prosecutor responded that the government's records contained no indication that any of petitioners' conversations had been intercepted (Tr. II 19-21). The district court then directed petitioners to submit affidavits concerning their claims (Tr. II 34-35). Only petitioners Sumpter and James Lincoln submitted affidavits. Both affidavits alleged merely that petitioners were acquainted with targets of the prior interceptions and that there was a substantial possibility that they had called the targets on the telephones that were tapped (J.A. 283-286, 287-290).

In response to these affidavits, the government submitted letters from a responsible official of the Department of Justice stating that neither Lincoln nor Sumpter had been subjected to interception on any of the lines in question (Pet. App. 12a).

The district court found that petitioners had failed to make any showing of taint with respect to the development of the informants in this case. The court also found that in light of the government's denial that any of their conversations had been intercepted, petitioners were "engaging in mere conjecture and speculation that they were possibly overheard during the prior illegal wiretaps" (J.A. 430). The court therefore denied them access to the

records of the prior interceptions. The court of appeals affirmed in a thorough opinion (Pet. App. 1a-24a), on which we rely.

ARGUMENT

1. Petitioners contend (Pet. 21) that their allegation that there was a "substantial possibility" that their conversations were intercepted in the course of prior illegal interceptions was sufficient to establish their standing to assert the illegality of the prior interceptions or at least to permit them to obtain the records of those interceptions. As the court of appeals properly concluded, however, petitioners' allegations were insufficient to justify the extensive discovery they sought. Because the government had denied that petitioners' conversations had been overheard in the course of the earlier interceptions they sought to challenge and because petitioners had "not otherwise demonstrated their standing to challenge any conjectured taint emanating from the 1970-73 intercepts" (Pet. App. 17a), the court of appeals held that petitioners were not entitled to the suppression of the wiretap evidence against them.

In order to challenge the introduction of evidence obtained by way of an illegal wiretap, a defendant must show that he has standing to object to the interceptions in question; that is, he must prove that he was "a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U.S.C. 2510(11); *Alderman* v. *United States*, 394 U.S. 165, 171-176.

To assist the defendant in challenging any unlawful interception directed against him, the government is required to affirm or deny whether the defendant has in fact been subjected to electronic surveillance, as he alleges. 18 U.S.C. 3504. If the answer is in the affirmative,

the defendant is entitled to examine the records relating to the intercepted communications that he has standing to challenge. If the answer is in the negative, however, that is the end of the matter. *In re Womack*, 466 F. 2d 555, 558 (C.A. 7).

In this case, the government stated unequivocally that petitioners' communications were not intercepted in the course of any of the eight wiretaps at issue. To contest this denial, petitioners are seeking access to the records of several thousand intercepted conversations over a period of several years (Pet. App. 13a). As the court of appeals observed (*ibid.*):

> By that technique, individuals whose rights, according to the Government, have not been infringed would gain far greater access to evidence in the Government's possession than would an accused whose rights concededly were violated. Indeed, the curious logic of appellants' stance would require the Government, after the most unequivocal denial of an interception, routinely to bare the content of any wiretapped conversation to any accused who can claim that he just might have been overheard.

Since a defendant is not ordinarily permitted to rummage in the government's files in the hope of discovering some basis for challenging evidence against him (*Taglianetti* v. *United States*, 394 U.S. 316, 317), the court of appeals properly treated the government's denial as conclusive.

The court of appeals left open the question whether under some circumstances an individual should be permitted to challenge the government's denial and should be able to shift the burden of going forward back to the government to demonstrate more conclusively that none of the defendant's conversations had been overheard. In this case, however, the court found that petitioners'

affidavits "fell far short of germinating a substantial suspicion that the Government's denial was untrustworthy" (Pet. App. 17a). While petitioners take issue with this characterization of their allegations, we submit that the court's characterization was accurate and that, in any event, there is no reason for this Court to review that factual determination.[2]

2. Petitioners make the related contention that the government's denial was not sufficient to preclude further inquiry into the question of standing, and that other courts—particularly the Seventh Circuit—have required more than a letter denial from the Department of Justice to constitute an adequate denial of interceptions under 18 U.S.C. 3504.

The courts of appeals vary in what they consider an acceptable denial of electronic surveillance for purposes of Section 3504.[3] As petitioner points out, the Seventh Circuit requires more than a letter denial by government officials. *Korman* v. *United States*, 486 F. 2d 926, 931. In

---

[2]Petitioners' reliance on *United States* v. *Fannon*, 435 F. 2d 364 (C.A. 7), in support of this claim for discovery of the tapes and transcripts of the eight prior interceptions is unjustified. In *Fannon*, the court of appeals found that because Fannon's co-defendant had been subjected to illegal wiretaps, there was a strong possibility that Fannon's conversations also had been overheard. Yet even under those circumstances the court did not permit Fannon to examine the logs of the intercepted conversations or review the government's investigative file regarding those interceptions. 435 F. 2d at 367. Accordingly, *Fannon* provides no support for a claim for such relief here.

[3]Compare *United States* v. *Aloi*, 511 F. 2d 585, 602 (C.A. 2), certiorari denied, 423 U.S. 1015; *United States* v. *Stevens*, 510 F. 2d 1101, 1104-1106 (C.A. 5); *United States* v. *D'Andrea*, 495 F. 2d 1170, 1174 n. 12 (C.A. 3), certiorari denied, 419 U.S. 855 (letter denials held sufficient), with *Korman* v. *United States*, 486 F. 2d 926 (C.A. 7) (letter denial insufficient). Each of these courts, however, has suggested that the procedure required of the government depends on the strength of the defendant's showing that his conversations may have

this case, however, in addition to the letter denials from the Department of Justice, sworn statements and testimony were also presented, denying prior interception of petitioners' conversations. The affidavits in support of the intercept applications stated that none of the information regarding petitioners was derived from prior interceptions, and in the course of the suppression hearings, the government introduced sworn statements or testimony denying previous electronic surveillance of either petitioner James Lincoln or Rosa Sumpter, the only two petitioners who submitted affidavits supporting their claims that they might have been subjected to illegal surveillance.[4] These sworn statements were sufficient to meet the Seventh Circuit's requirement of "a more formal and binding denial." *Korman* v. *United States, supra,* 486 F. 2d at 931. Accordingly, the denials in this case would have met even the most demanding standard.

3. Petitioners also contend (Pet. 27-37) that the applications for the intercept orders did not sufficiently explain why other investigative techniques were inadequate.[5]

---

been intercepted. See also *In re Hodges,* 524 F. 2d 568, 570 (C.A. 1); *In re Buscaglia,* 518 F. 2d 77, 79 (C.A. 2); *United States* v. *See,* 505 F. 2d 845 (C.A. 9). Accordingly, it appears that the variations in the requirements imposed by different courts of appeals may turn more on the strength of each particular claim of unlawful interception than on any firm differences in the requirements imposed on the government in similar settings.

[4]These denials were in the form of an affidavit by an FBI agent stating that FBI records revealed no interception of petitioner James Lincoln on the two wiretaps specified in his affidavit (J.A. 291), and testimony by another FBI agent that in the course of his investigation of petitioner Rosa Sumpter he had not acquired any information from any illegal wiretap, nor was he aware of any illegal wire interception of her (1 Tr. 131-132).

[5]18 U.S.C. 2518(1)(c) provides that every application for an interception order shall include "a full and complete statement as to

18 U.S.C. 2518(1)(c) requires the application and accompanying affidavit to contain a "full and complete statement" why other investigative techniques are inadequate. The requirements of Section 2518(1)(c) are satisfied when an affidavit, read in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provides a sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain the full scope of their activities and to identify the participants. See, *e.g., United States* v. *Kahn,* 415 U.S. 143, 153 n. 12; *United States* v. *Turner,* 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States,* 423 U.S. 996; *United States* v. *Steinberg,* 525 F. 2d 1126, 1129-1131 (C.A. 2), certiorari denied, 425 U.S. 971; *United States* v. *De La Fuente,* 548 F. 2d 528, 537-538 (C.A. 5); *United States* v. *Jackson,* 549 F. 2d 517, 536-537 (C.A. 8).

The court of appeals properly concluded that the affidavits here provided such a factual basis (Pet. App. 18a-24a). The affidavits accompanying the applications clearly indicated that the informants who were familiar with the gambling operation and who had provided useful information were afraid to testify. This factor strongly indicates the propriety of the interceptions. See *United States* v. *Alfonso,* 552 F. 2d 605 (C.A. 5); *United States* v. *Feldman,* 535 F. 2d 1175 (C.A. 9), certiorari denied, 429 U.S. 940. The affidavits also detailed the results of years of investigation that included the use of confidential

---

whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

informants (J.A. 76-93), physical surveillance (J.A. 97-112), agency checks (J.A. 67, 94-96), and a pen register (J.A. 113-123). Although those efforts had supplied ample probable cause to believe petitioners were conducting illegal gambling operations, they had provided insufficient evidence to prosecute petitioners. Finally, the affidavits expressed the affiant's view that on the basis of his experience in gambling investigations, further pursuit of the methods previously utilized would not yield sufficient evidence (J.A. 130, 237).

The affidavits in this case thus contained more than the conclusory allegations found insufficient in *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), on which petitioners rely. The affiant's conclusions, based on his experience with the type of criminal activity under investigation, were properly supplemented with facts sufficient to indicate that electronic surveillance was not being used as the first step in the investigation. *United States* v. *Landmesser*, 553 F. 2d 17 (C.A. 6); *United States* v. *Alfonso*, 552 F. 2d 605 (C.A. 5). The affidavits in this case meticulously described the efforts to obtain the evidence of petitioners' criminal activity without the use of electronic surveillance. Accordingly, they were sufficient to establish the need for the interception and thus to satisfy the requirements of 18 U.S.C. 2518(1)(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys.

AUGUST 1978.

DOJ-1978-08